



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Joseph Sandler, Esq.
Sandler, Reiff & Young, PC.
300 M Street SE
Suite 1102
Washington, DC 20003

APR 26 2010

RE: MUR 6021
Democratic National Committee and
Andrew Tobias, in his official
capacity as treasurer

Dear Mr. Sandler:

On June 5, 2008, the Federal Election Commission notified your clients, the Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time. On October 20, 2008, the Commission notified your clients of a supplement to the initial complaint, and a copy of the supplement was forwarded to your clients at that time. On January 12, 2010, the Commission notified your clients of additional information from the complainant pertaining to the allegations in the complaint, and a copy of this additional information was forwarded to your clients at that time. On April 13, 2010, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe the Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 434(b), and closed the file.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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Joseph Sandler, Esq.
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If you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Democratic National Committee and **MUR 6021**
Andrew Tobias, in his official capacity as treasurer

I. INTRODUCTION

The complaint in this matter alleges a concerted effort to deny ballot access in 2004 to Ralph Nader and Peter Miguel Camejo ("Nader-Camejo") for the purpose of benefiting Kerry for President 2004, Inc. and Kerry-Edwards 2004, Inc. (collectively "the Kerry Committee") by the Democratic National Committee and Andrew Tobias, in his official capacity as treasurer ("DNC"). The complaint is 575 pages long, with 100 pages of allegations and 475 pages of exhibits, supplemented by a 100-page 2008 Presentment by a Pennsylvania state grand jury that charges a former Pennsylvania state representative, a former Pennsylvania House Minority Whip, and ten staffers who worked for the former Pennsylvania state representative and for the Pennsylvania House Democratic Caucus, with a "concerted plan to use taxpayer funds, employees, and resources for political campaign purposes" between 2004 and 2007.

The complaint is only one of several actions the complainant has initiated alleging violations of law stemming from an alleged concerted action to keep Nader-Camejo off the 2004 Presidential ballot in several states. Starting in 2007, Mr. Nader made the same factual allegations in separate federal lawsuits. *See Nader v. Democratic Nat'l Comm.*, 590 F.Supp.2d 164 (D.D.C. 2008); *Nader v. Democratic Nat'l Comm.*, 555 F.Supp.2d 137 (D.D.C. 2008); and *Nader v. McAuliffe*, 549 F.Supp.2d 760 (E.D. Va. 2008). In the lawsuits, Nader based his claims on abuse of process, malicious prosecution, conspiracy to abuse process and malicious prosecution, violation of his constitutional right to run for federal office and his supporters' constitutional rights to vote for him under 42 U.S.C. § 1983, and conspiracy to violate 42 U.S.C.

1 § 1983. The district courts dismissed these cases on various grounds, including failure to state a
2 claim, lack of subject matter jurisdiction, constitutional grounds, and *res judicata*. See *Nader v.*
3 *Democratic Nat'l Comm.*, 555 F.Supp.2d 137 (D.D.C. May 27, 2008); *Nader v. Democratic*
4 *Nat'l Comm.*, 590 F.Supp.2d 164 (D.D.C. December 22, 2008); and *Nader v. McAuliffe*, 593
5 F.Supp.2d 95 (D.D.C. January 7, 2009). Recently, the U.S. Court of Appeals for the D.C. Circuit
6 affirmed the dismissal of one of Nader's complaints on the grounds that he filed suit outside the
7 statute of limitations. *Nader v. Democratic Nat. Committee*, 567 F.3d 692 (D.C.Cir. June 9,
8 2009), and denied Mr. Nader's petition for an *en banc* reconsideration of that outcome. *Nader v.*
9 *Democratic Nat. Committee*, 567 F.3d 692 (D.C.Cir. July 28, 2009). Nader did not appeal the
10 dismissal of the other two complaints.

11 In the present matter, according to the complaint, the alleged concerted effort to benefit
12 the Kerry Committee resulted in violations of the Federal Election Campaign Act of 1971, as
13 amended (the "Act"). The complaint alleges that law firms provided uncompensated legal
14 services and resources while still paying firm attorneys, the value of which constituted an
15 undisclosed prohibited corporate in-kind contribution, in violation of 2 U.S.C. §§ 434(b) and
16 441b ("Count 1"). The complaint further alleges that Service Employees International Union
17 ("SEIU") and America Coming Together ("ACT") made prohibited and excessive contributions
18 in connection with their coordinated efforts to deny Nader-Camejo ballot access in Oregon, in
19 violation of 2 U.S.C. §§ 441(b) and 441a(f) ("Count 2"). Both allegations implicate the DNC as
20 part of the general conspiracy to deny Nader-Camejo ballot access during the 2004 election
21 cycle, and may suggest that the DNC itself accepted and failed to disclose prohibited
22 contributions, as well as the Kerry Committee.

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As discussed in more detail below, Count 1's allegation is general and not supported by specific facts and therefore fails to provide a reason to believe that a violation of the Act occurred and open an investigation into whether the DNC was involved in a scheme whereby corporate law firms made prohibited in-kind contributions to the Kerry Committee that the Kerry Committee failed to report. As to Count 2, this allegation, as a whole, also fails to provide a reason to believe that a violation occurred, and thus insufficient grounds to investigate. In addition, while the activity at issue occurred in 2004, the complaint was not filed until 2008. Thus, among other reasons, the age of the alleged violations would create problems of proof and raise obstacles under the five-year statute of limitations. Therefore, the Commission found no reason to believe that the Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 434(b).

II. FACTUAL AND LEGAL ANALYSIS

A. Count 1: Alleged Undisclosed Corporate Contributions

1. Facts

The Complaint maintains that in order to help the Kerry Committee win the election in 2004, the DNC coordinated their efforts with the Kerry Committee, and at least 18 state or local Democratic Parties to file 24 complaints and/or intervened in legal or administrative proceedings to challenge Nader-Camejo's nomination papers in 18 states. Complaint at 2-3. At least fifty-three law firms (and ninety-five lawyers nationwide) allegedly provided legal services for this effort. *Id.* at 6. Since, according to the complaint, the "vast majority of these law firms are incorporated," the value of legal services they provided free of charge while compensating the firms' attorneys constituted undisclosed prohibited in-kind contributions to the Kerry Committee. Complaint at pp. 5-6. Paragraphs 24-73, 75-77, 79-86, 88-93, 97-108, and 287 of

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1 the complaint name law firms and attorneys participating in ballot challenges. Paragraph 287
2 alleges that the Reed Smith law firm allegedly donated 18 attorneys to the Pennsylvania lawsuit
3 and billed their time to “charity,” without charging any clients.

4 In support, the complaint alleges that the law firm attorneys generated \$2 million in free
5 legal services. Complaint at 51. In addition, the complaint relies on the sworn testimony of
6 Dorothy Melanson, Maine Democratic chair and DNC official, that the DNC paid the costs of
7 her ballot challenge lawsuit in Maine, and on e-mails that allegedly show that the DNC and
8 Kerry Committee staff assisted ballot challenge lawsuits. *Id.* at 7-8, 48-49. In response to the
9 complaint, the DNC denied the allegations in Count 1, and requested that the Commission
10 dismiss the complaint.

11 **2. Analysis**

12 The Act prohibits corporations from making any “contribution.” 2 U.S.C. § 441(b)(a).
13 The Act defines “contribution” as the provision of something of value “for the purpose of
14 influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). A “contribution” includes
15 the “payment by any person of compensation for the personal services of another person which
16 are rendered to a political committee without charge for any purpose.” 2 U.S.C. § 431(8)(A)(ii).
17 The Act specifies that legal services rendered to or on behalf of an authorized committee of a
18 candidate are neither a contribution nor an expenditure “if the person paying for such services is
19 the regular employer of the individual rendering such services and if such services are solely for
20 the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26.” 2
21 U.S.C. §§ 431(8)(B)(viii)(II) and (9)(B)(vii)(II); 11 C.F.R. §§ 100.86 and 146. Further, the value
22 of services provided without compensation by any individual who volunteers on behalf of a

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1 candidate or political committee is not a contribution or an expenditure. 11 C.F.R. §§ 100.74
2 and 100.111 ("volunteer exemption").

3 First, even assuming that some of the fifty-three law firms and ninety-five attorneys
4 named in Paragraphs 24-73, 75-77, 79-86, 88-93, 97-108, and 287 of the complaint assisted in
5 legal challenges free of charge to the Democratic state and local parties and individuals who filed
6 the ballot challenges, the complaint does not specify, with one exception, which firms allegedly
7 provided free services or to whom, which of those firms are incorporated, and of those, which
8 firms compensated their attorneys who worked on the ballot challenges. Without such
9 information, and given that any free attorney services may have been provided by volunteers
10 without any sponsorship from their employer, there is no reason to believe a violation of the Act
11 occurred, and therefore insufficient grounds to investigate the 2004 activities and billing
12 practices of the fifty-three law firms and ninety-five attorneys.

13 As for the only law firm specifically alleged to have provided free services to benefit the
14 Kerry Committee, the information in the complaint is contradictory. Specifically, the allegation
15 is that the Reed Smith law firm reportedly billed its costs for the Pennsylvania ballot challenge to
16 "charity, without charging any client." That allegation is based on an October 1, 2004, article in
17 the *American Lawyer*. Complaint at 50, Paragraph 287 and Exhibit 41. However, in response to
18 claims asserted in that article and another press report that attorneys worked on the ballot
19 challenges free of charge for the non-partisan purpose of ensuring ballot integrity, the complaint
20 also alleges that the DNC's disclosure reports show that it paid Reed Smith \$136,142 in
21 "political consulting" and "legal consulting" fees in October and November 2004. See Paragraph
22 286. The contradictory allegations in the complaint as to whether Reed Smith was paid for its
23 work and the lack of specific facts in the complaint indicating that the law firm paid its attorneys

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1 for their work on the ballot petition charges, as opposed to those attorneys having volunteered
2 their time without compensation, render the only specific allegation in Count 1 insufficient to
3 create a reason to believe a violation of the Act occurred and to warrant an investigation.

4 Likewise, the other information included in the complaint does not give rise to a reason to
5 believe that a violation of the Act occurred as to Count 1, and therefore does not warrant an
6 investigation. With respect to the Melanson testimony, Dorothy Melanson, who filed the Maine
7 challenge, testified that the Democratic Party contacted her and stated that it would support her
8 financially with respect to her challenge. She further testified that she had not spoken to the
9 DNC regarding the specific amount of funding she would receive in connection with the ballot
10 challenge, and contrary to the allegation in the complaint, stated that she brought the challenge
11 on her own and was not directed to do so by the DNC. *See* Complaint at 8 and Exhibit 1. In its
12 response, the DNC maintains that Ms. Melanson filed one of the two ballot access complaints on
13 her own behalf, and other DNC staff filed similar complaints on their own behalf without DNC
14 direction or control. DNC Response at 6. The DNC states that there is no evidence that anything
15 other than volunteer legal services were provided to the ballot petition challengers, "it was not a
16 party in any of the ballot access petition challenges," and that it "did not receive and fail to report
17 any in-kind legal services from law firms representing ballot access petition challengers." *See*
18 DNC Response at 6-8. *Id.* The most the Melanson testimony suggests is that the DNC may have
19 paid some or all of her legal costs, not that it recruited and obtained free legal services, and it
20 fails to show any link at all to the Kerry Committee.

21 Similarly, the e-mails cited in the complaint as evidence of a coordinated scheme do not
22 specifically tie the DNC to the making of prohibited in-kind corporate contributions. Exhibit 7
23 of the complaint includes an e-mail communication from Caroline Adler, who is described as a

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1 DNC and Kerry Committee employee, to DNC employees who helped prepare challenges to
2 Nader-Camejo's nomination papers. The e-mail, with the subject entitled "DNC's Anti-Nader
3 phone script," includes an attachment entitled "Script for Nader Petition Signers," which DNC
4 employees allegedly used as a guideline when calling to talk to people who signed Nader-
5 Camejo's petitions. Exhibit 9 includes an e-mail from Judy Reardon, the Kerry Committee's
6 deputy national director for Northern New England. According to the complaint, this e-mail
7 indicates that Ms. Reardon herself drafted one of the complaints against Nader-Camejo and
8 coordinated with the state Democratic Party officials and attorneys who filed it. Martha Van
9 Oot, an attorney who represented parties attempting to deny Nader-Camejo ballot access in New
10 Hampshire, replies "Great job, Judy," with her own hand-written revisions attached. New
11 Hampshire Democratic Party Chair and DNC official Kathleen Sullivan, who filed the
12 complaint, was copied on this exchange.

13 In its response, the DNC states that the e-mails do not indicate that the DNC itself filed
14 the ballot petition challenges, or provide evidence that the DNC accepted corporate in-kind
15 contributions from law firms. DNC Response at 10. There is no information to the contrary.

16 Complainant maintains in his cover letter to the supplement that the 2008 Pennsylvania
17 Grand Jury Presentment supports his allegations that unnamed "Respondents" specifically
18 intended to benefit "the Kerry Committee by challenging the Nader-Camejo Pennsylvania ballot
19 petitions," and that unnamed "Respondents" made undisclosed contributions to the Kerry
20 Committee. However, the Presentment does not contain facts supporting alleged undisclosed
21 prohibited corporate contributions by law firms to the Kerry Committee. The Presentment states
22 at page 55, as an introduction to the description of an alleged scheme to have state employees
23 work on the Nader challenge at taxpayer expense, that "[i]t was generally assumed, in

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1 Democratic circles, that Nader's appearance on the ballot would be detrimental to Democratic
2 Presidential Candidate John Kerry, since Nader would siphon votes from Kerry." From this
3 statement, the supplement purportedly derives support for the complaint's allegations that
4 unnamed "Respondents specifically intended to benefit" the Kerry Committee and "made
5 unlawful and unreported contributions to" it. Supplement at 10. Moreover, complainant asserts
6 that a law firm, not named in the Presentment, which was involved in the Pennsylvania Nader
7 challenge was "retained by or received payment from the Respondents who orchestrated
8 Respondents' nationwide effort to deny ballot access to Nader-Camejo" to support "the inference
9 that Respondents' related conduct in 17 other states was likewise intended to benefit" the Kerry
10 Committee, and that the law firm made a contribution to the Kerry Committee. *Id.* at 10-12.¹
11 However, the Presentment makes no findings as to the Kerry Committee or the law firm, and
12 does not link any of the activities charged to any activities or knowledge of the Kerry
13 Committee, the DNC, lawyers, or to any actors outside of Pennsylvania. Therefore, it adds no
14 support to complainant's allegations in Count 1.

15 Even if there were corporate law firms that provided free services to ballot challengers
16 while compensating their attorneys, the complaint does not present facts sufficient to support that
17 those services constituted undisclosed in-kind contributions accepted or received by the Kerry
18 Committee. Merely alleging that entities including the DNC worked "in conjunction with" the
19 Kerry Committee, without supporting facts suggesting that its efforts were on behalf of the Kerry
20 Committee or other indicia of concerted activity, does not provide a reason to believe that a

¹ Although acknowledging that the Presentment does not name the law firm, the complainant states that there is "little doubt" that Reed Smith was the law firm that filed the challenge to the Nader-Camejo 2004 Pennsylvania nomination papers. Cover letter to Supplement at 12. The cover letter to the supplement goes on to acknowledge that the Presentment also does not specifically state that the attorneys who filed the Pennsylvania charge knew it was prepared using funds and resources misappropriated from the taxpayers, but then asserts that the Presentment suggested they knew or should have known. *Id.* Even if that were so, that suggestion does not constitute a FECA violation.

1 violation of the Act occurred, and thus fails to provide sufficient grounds to investigate. This is
2 particularly so, where, as here, the allegation has been specifically refuted and there is no
3 information to the contrary.

4 The Commission has stated that “unwarranted legal conclusions from asserted facts or
5 mere speculation will not be accepted as true,” and “[s]uch purely speculative charges, especially
6 when accompanied by a direct refutation, do not form an adequate basis to find reason to believe
7 that a violation of the FECA has occurred.” *See* Statement of Reasons, MUR 4960 (Hillary
8 Rodham Clinton for Senate Exploratory Committee, issued December 21, 2000) (citations
9 omitted). Here, without specific facts suggesting that (1) attorneys from corporate law firms
10 assisting in Nader ballot challenges were compensated by their firms for this work, and (2) even
11 if they were, that the DNC played a role in this activity, there is nothing left but speculative
12 charges that have been directly refuted, providing an insufficient basis to find reason to believe
13 that a violation of the Act occurred, and therefore an insufficient basis for an investigation.

14 Accordingly, the Commission has determined to find no reason the Democratic National
15 Committee and Andrew Tobias, in his official capacity as treasurer, violated 2 U.S.C.
16 §§ 434(b) and 441b(a) by accepting, and failing to disclose, prohibited contributions from
17 corporate law firms.

18 **B. Count 2: Allegations Relating to the Activities of ACT and SEIU**

19 **1. Factual Background**

20 Count 2 of the complaint alleges that ACT and SEIU’s efforts to prevent Nader-Camejo
21 from being placed on the ballot in the State of Oregon resulted in prohibited and undisclosed
22 contributions and expenditures. Complaint at 93. In support, the complaint refers to an August
23 16, 2004, blog entry from ACT employee William Gillis, who stated that ACT shared the

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1 Portland, Oregon, office space with political campaign staff from SEIU, and that he witnessed
2 “higher echelons of both staffs” organize “a concerted effort among the ACT/SEIU staff to
3 attack the Nader petition drive,” by signing petitions where petitioners were required to sign, and
4 then scratching out the signatures, thereby invalidating the entire petition. Complaint at 74. It
5 also attempts to link SEIU and the DNC by noting that SEIU’s Secretary-Treasurer, Anna
6 Burger, is a DNC official, and SEIU both “endorsed and publicly committed its resources to
7 electing Kerry in 2004.” Complaint at 76. Exhibit 27 of the complaint lists Ms. Burger as a
8 “member-at-large” on the DNC’s membership roster in 2004.

9 Count 2 also alleges that SEIU made an excessive or prohibited contribution to the DNC
10 based on a November 1, 2004, press release entitled “Anatomy of an Election Strategy: The
11 Facts on SEIU’s Role in Bringing Home a Victory for America’s Working Families,” in which
12 SEIU claims that among the specific acts it took to shape the outcome of the 2004 election was
13 giving \$1 million to the DNC. Complaint at 94, Exhibit 60. A separate document attached to the
14 press release specifies that “SEIU contributed \$1,000,000 to fund various DNC activities.” *Id.*
15 The DNC did not respond to this aspect of the complaint.

16 2. Analysis

17 The Act prohibits labor organizations like SEIU from making contributions to any
18 candidate, campaign committee, or political party or organization in connection with any election
19 to federal election. 2 U.S.C. § 441b. In 2004, the Act also limited contributions by entities like
20 SEIU’s PAC to any candidate or his or her authorized political committee with respect to any
21 election for federal office, which, in the aggregate, exceeded \$5,000. 2 U.S.C.
22 § 441a(2)(A) (2004). With respect to political committees established and maintained by a
23 national political party, which are not the authorized political committees of any candidate, the

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1 Act also limited contributions by entities like SEIU's PAC to \$15,000 per calendar year.

2 2 U.S.C. § 441a(2)(B).

3 The allegations in Count 2 of the complaint are insufficient for two reasons. First, the
4 complaint does not allege, and the available information does not suggest, that SEIU's and
5 ACT's activities in Oregon were coordinated with the DNC, or any other entity. The fact that
6 Anna Burger, an SEIU official, is also a member-at-large of the DNC, does not, without more,
7 suggest otherwise, as such at-large membership within the DNC does not provide a basis to infer
8 that she was "materially involved" or even aware of material information in the decision-making
9 of the DNC's plans, projects, or needs. 11 C.F.R. § 109.21(d)(2). The available information
10 does not indicate that Ms. Burger was a member of the DNC's Executive Committee, the only
11 committee within the DNC responsible for such decision-making. *See* The Charter and the
12 Bylaws of the Democratic Party of the United States (as amended Jan. 19, 2002). Further, the
13 complaint's allegation that ACT and SEIU shared facilities and organized "an attack" on the
14 Nader petition drive similarly provides no link between such factual allegations and the DNC.

15 Second, with respect to SEIU, the complaint's allegation that SEIU made a prohibited or
16 excessive contribution to the DNC is based solely upon a press release stating that SEIU gave \$1
17 million to the DNC. This statement has a number of possible meanings, and the possibility that
18 SEIU made and intended to publicize a \$1 million contribution to the DNC seems unlikely and
19 has been generally refuted by SEIU in a prior MUR. In MUR 5612 (SEIU), where the
20 Commission found no reason to believe that SEIU or the DNC violated 2 U.S.C. § 441b in
21 connection with a fundraiser that allegedly forwarded the proceeds from the event to the DNC,
22 the complaint relied in part on the same SEIU press release. In response to that complaint, SEIU
23 stated that it had engaged in political activities that did not provide a basis for a complaint, such

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1 as lobbying, voter education, voter registration, and get-out-the vote drives, but not independent
2 expenditures or electioneering communications. SEIU also stated that no general treasury funds
3 were used to support independent expenditures or contributions. We have no information to the
4 contrary. The FEC disclosure database does not reveal any direct contributions by SEIU itself to
5 the DNC; SEIU's political action committee disclosed contributions totaling only \$30,000 to the
6 DNC during the 2004 election cycle. In the absence of other facts supporting an allegation that
7 the DNC received a prohibited or excessive contribution, the press release alone does not provide
8 reason to believe a violation of the Act occurred, and therefore no justification for an
9 investigation.

10 Accordingly, the Commission has determined to find no reason to believe that the
11 Democratic National Committee and Andrew Tobias, in his official capacity as treasurer,
12 violated 2 U.S.C. §§ 441b and 441a(f) in connection with Count 2.

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